No. 95-690

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

THEODORE H. FRIEDMAN
Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Southern District and the Second Circuit failed to give independent consideration to petitioner's state court disbarment, as required by *Selling v. Radford*, 243 U.S. 46 (1917), where petitioner failed to present clear and convincing evidence that the state court proceeding was flawed.

2. Whether a federal court in a reciprocal disciplinary proceeding, after an independent examination of the issues, may discipline a federal practitioner based on state court disciplinary findings proved, in accordance with state law, by a preponderance of the evidence.

3. Whether an attorney who has been found guilty of multiple acts of serious professional misconduct may challenge his reciprocal disbarment in federal court by asserting that he has already been disciplined at the federal bar for some (but not all) of those acts, where the state tribunal entering the original order of disbarment has explicitly stated that any one of the attorney's many misdeeds would constitute sufficient grounds for disbarment.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Grievance Committee for the Southern District of New York respectfully urges this Court to deny the petition for a writ of certiorari filed in this action by petitioner Theodore H. Friedman, a disbarred lawyer.

OPINIONS BELOW

Petitioner Friedman seeks a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit (Petitioner's Appendix A, pp. 1a-7a), which affirmed an order of the United States District Court for the Southern District of New York suspending petitioner from the practice of law in that district "until such time as he is reinstated to practice law in the State of New York." (Petitioner's Appendix C, pp. 10a-11a). The district court's order of reciprocal discipline, entered after notice and an opportunity to be heard, followed a final order of disbarment by the New York Appellate Division, First Department (Petitioner's Appendix E, pp. 14a-38a), which sustained 13 separate charges of professional misconduct found against petitioner by a Special Referee. (Petitioner's Appendix F, pp. 45a-70a).

Petitioner sought direct review of his state disbarment in the New York Court of Appeals, which dismissed his appeal for want of a substantial constitutional question. (Petitioner's Appendix D, pp. 12a-13a). Petitioner also sought review of his state disbarment proceedings in this Court, which denied his petition for a writ of certiorari. 115 S.Ct. 81 (1994). On the same day it denied the petition for a writ of certiorari, this Court entered an order suspending petitioner from practice in this Court and requiring him to show cause why he should not be disbarred. 115 S.Ct. 48 (1994). Following receipt of a response from petitioner, this Court disbarred petitioner as a result of the same charges underlying the decision of the Second Circuit for which review is sought here. 115 S.Ct. 629 (1994).

JURISDICTION

Respondent agrees that this Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Petitioner purports to challenge Rule 4 of the General Rules of the United States District Court for the Southern District of New York. (Petitioner's Appendix G).

STATEMENT OF THE CASE

1. Petitioner's New York Disbarment

Petitioner is a New York lawyer who was disbarred after protracted disciplinary proceedings in which he was found by both the Special Referee hearing his case and a unanimous five-judge panel of the New York Appellate Division, First Department, to have engaged in professional misconduct going "to the heart of [the] ethical responsibility of a practicing lawyer." *In re Friedman*, 196 A.D. 2d 280, 295-296, 609 N.Y.S.2d 578, 586-587 (1st Dep't 1994). The findings are multiple and serious – ranging from suborning perjury of witnesses to submitting false affidavits – and demonstrate "a contempt for the legal and judicial process as well as for the profession." *Id.*

The Special Referee's report and the Appellate Division's opinion, both of which are reprinted in petitioner's Appendix (*see* Appendix 14a-70a), contain lengthy discussions as to the underlying facts surrounding each allegation and finding of misconduct. Because the issue here concerns the propriety of the Second Circuit's imposition of reciprocal federal discipline, the lengthy record of the state disciplinary proceedings, which includes some 4,000 pages of hearing testimony plus

hundreds of documentary exhibits, may be briefly summarized.

Petitioner was charged in 1990 with professional misconduct in connection with his representation of personal injury claimants in two matters. The first of these cases, *Mowen v. Yangming Marine Transport Corp.*, 78 Civ. 5537 (PNL), was a wrongful death action tried in the Southern District of New York in the early 1980's. The dispute centered about an unreceived exhibit, prepared by petitioner's expert on the subject of damages, which was discovered to have been improperly placed in the jury room during deliberations.

Petitioner was charged with four counts of professional misconduct by a panel of attorneys appointed to investigate the matter by the Committee on Grievances of the Board of Judges of the Southern District of New York. Two of the counts related to petitioner's filing of a false affidavit blaming his co-counsel for having placed the unreceived exhibit in the jury room; one related to petitioner's false testimony at a hearing conducted into the matter by the federal judge presiding over the case; and one related to the presence of the unauthorized exhibit in the jury room, specifically alleging that petitioner had been the responsible party.

Pursuant to a plea bargain arrangement, petitioner admitted one of the charges – filing a false and misleading affidavit without personal knowledge or factual basis – in exchange for an agreement by the Federal Grievance Committee to drop the other charges. Petitioner was not the subject of an evidentiary hearing on the other three charges, although he was put on notice

that the unadmitted charges might be the basis for further disciplinary proceedings.

The same events were then made the subject of six counts of wrongdoing by the New York state disciplinary authorities, which conducted an independent review of the matter. The first charge, alleging that petitioner had caused the exhibit to be in the jury room, was found by the Special Referee not to have been proved by a fair preponderance of the evidence. (Petitioner's Appendix F, pp. 48a-49a). However, the Special Referee sustained the remaining counts, including those charging petitioner with knowing submission of a false affidavit and knowing false testimony given during the hearing. (*Id.* at pp. 49a-53a). In all material respects, the Appellate Division confirmed the report of the Special Referee. (Petitioner's Appendix E, pp. 16a-23a, 37a-41a).

The second set of charges concerned the case of *Estate of Aron Krieger v. City of New York*, Index No. 6228/80, another wrongful death matter growing out of an elevator accident in a city-owned building. It was alleged, and the Special Referee found, that petitioner had improperly coached a witness to testify falsely about various matters and to give "disinformation" to petitioner's adversary. The Special Referee also found that petitioner had failed to disclose to the Court and jury that another witness had testified falsely about significant credibility matters. (Petitioner's Appendix F, pp. 53a-62a).

Additional findings against petitioner were that he failed to exercise reasonable supervision over his private investigator; that he engaged in unethical fee splitting; and that he had paid, or acquiesced in the payment of,

excessive and unreasonable compensation to fact witnesses. (*Id.*) In all, the Special Referee determined nine of eleven *Krieger* charges against petitioner. (*Id.*) The Appellate Division affirmed in all respects. (Petitioner's Appendix E, pp. 23a-37a, 39a-41a).

Petitioner sought to appeal his disbarment as of right to the New York Court of Appeals. By order dated May 3, 1994, the Court of Appeals dismissed the appeal on the ground that it presented no substantial constitutional question. (Petitioner's Appendix D, pp. 12a-13a). A motion for reargument in the Appellate Division, submitted April 21, 1994, was likewise denied except to the extent of changing two words in the Court's opinion. With the finality of the New York disbarment order, petitioner petitioned for a writ of certiorari from this Court, a request which was denied on October 4, 1994. 115 S.Ct. 81 (1994).

2. The Southern District Reciprocal Disciplinary Proceedings

Upon notification of petitioner's state disbarment, the Southern District Grievance Committee entered a "show cause" order on April 4, 1994, directing petitioner to demonstrate why reciprocal federal discipline should not be imposed pursuant to Southern District General Rule 4(d). The order invited petitioner to make a submission in writing by May 4, 1994. Petitioner was thus given 30 days to submit whatever factual or legal contentions he deemed appropriate as to why the imposition of reciprocal disbarment was unwarranted.

On May 4, 1994, petitioner's counsel wrote to the district court requesting a stay of all federal disciplinary

proceedings until the New York Court of Appeals had acted on petitioner's then pending appeal from the Appellate Division's disbarment order. (Petitioner's Appendix I, pp. 81a-84a). The letter went on, however, to reveal two "potential" arguments in support of the position that the New York order of disbarment should not be adopted by the Southern District of New York. Citing cases and elaborating in some detail, petitioner contended, first, that the higher standard of proof for federal court disbarment would require a *de novo* hearing and, second, that any further discipline in the federal court should not be based on the *Mowen* charges, which were the subject of the earlier Southern District disciplinary proceeding. (*Id.*)

Two days later, May 6, 1994, petitioner's counsel wrote again to the Southern District, informing it that the New York Court of Appeals had dismissed petitioner's direct appeal for want of a substantial constitutional question. (Petitioner's Appendix J, pp. 83a-87a). Notwithstanding this development, petitioner suggested that it would be "appropriate and fair" for the Southern District to continue to hold its proceedings in abeyance while he prepared and filed a petition for a writ of certiorari. It was again urged, in the same letter, that New York's preponderance-of-the-evidence standard, on which the state court disbarment order was based, was inconsistent with federal constitutional due process. (*Id.*)

Having given petitioner ample notice and an opportunity to be heard, having considered his submissions, which included detailed arguments going to the merits, and having been led to believe that the Appellate Division's order of disbarment was final, the Southern District Grievance Committee issued an order

dated May 26, 1994, directing that "respondent [Mr. Friedman] be suspended from practice in the United States Court for the Southern District of New York until such time as he is reinstated to practice law in the State of New York." (Petitioner's Appendix C, pp. 10a-11a).

3. The Second Circuit's Affirmance

On appeal, the Second Circuit affirmed the district court's suspension order. Joining the numerous courts (including this Court) that have rejected petitioner's challenge to his disbarment, the Second Circuit concluded that petitioner had been given an ample opportunity to be heard in the district court. It noted that petitioner had elected to respond to the show cause order by demanding an extension of time "which the district court was in no way obligated to grant." (Petitioner's Appendix A, p. 6a). It also found that petitioner had presented the "substance of reasoned arguments" in opposition to the suggestion of disbarment. (*Id.* at p. 5a). The district court therefore had before it "the relevant facts and detailed legal arguments" when it made its decision. (*Id.* at p. 6a).

The Second Circuit determined that petitioner had failed to prove "by clear and convincing evidence" – as required by Southern District Rule 4(g) – that "the New York procedures were wanting." (Petitioner's Appendix A, p. 6a). On this point, the court found persuasive that this Court, following precisely the procedures employed by the Southern District, had also disbarred petitioner and implicitly rejected his claim that a preponderance-of-the-evidence standard of proof deprived him of due process. (*Id.* at pp. 6a-7a).

Finally, the Second Circuit rejected petitioner's preclusion argument, finding that "other serious and substantial charges" before the district court warranted suspension, even without consideration of the *Mowen* charges that were the subject of the earlier disciplinary proceeding in the Southern District. (*Id.* at p. 7a).

4. Petitioner's Reciprocal Disbarment By This Court

On October 3, 1994, this Court, acting pursuant to Rule 8.1 of the Rules of the Supreme Court, suspended petitioner from practice before it and ordered him to show cause why he should not be disbarred. *In re Friedman*, 115 S.Ct. 48 (1994). Petitioner submitted a response, and on December 5, 1994, this Court disbarred him. *In re Friedman*, 115 S.Ct. 629 (1994). This Court specifically cited the New York disciplinary action as the basis for its disbarment. *Id.*

REASONS FOR DENYING THE WRIT

Petitioner advances three main arguments to show that this case is certworthy. He first contends that Southern District Rule 4(g) conflicts with governing precedent of this Court and with rulings of other circuits because it imposes upon the accused attorney the burden of establishing by clear and convincing evidence that the state court discipline is erroneous. Second, he argues that the Second Circuit's approval of reciprocal federal disbarment based on a "preponderance of the evidence" standard conflicts with other circuits and should be disapproved. And finally, he urges that the Southern District's federal disbarment was a form of "double

jeopardy" because it allegedly punished him twice for the same conduct arising out of the *Mowen* case.

The "conflicts" identified by petitioner are more illusory than real. Even a casual reader of the authorities on which petitioner relies can see that the Second Circuit's decision in this case is fully consistent not only with rulings of the other courts of appeals, but with the authoritative pronouncements of this Court. Even if there were a weak split – which there is not – the questions presented for review have only rarely arisen in the lower federal courts and are unlikely to spawn recurring problems. The issue, thus, does not warrant review by the United States Supreme Court.

More fundamentally, even if petitioner had raised a certworthy issue, this case would not be an appropriate vehicle for settling it. The imposition of a heightened burden of proof in reciprocal discipline cases would not be outcome determinative here. Indeed, the burden of proof could not be raised high enough to shield petitioner from the overwhelming evidence against him. That evidence permitted only one conclusion – petitioner is guilty of serious professional misconduct for which he received appropriate punishment.

I.

SOUTHERN DISTRICT RULE 4(g) IS CONSISTENT WITH DECISIONS OF THIS COURT AND WITH RULINGS OF OTHER CIRCUITS

A. The Alleged Conflict With This Court

Petitioner's feature argument is that the Second Circuit reached a decision in conflict with governing precedent of this Court. Specifically, petitioner alleges that the Second Circuit's interpretation of Southern District Rule 4(g) improperly assigned to him the burden of showing good cause why he should not be disbarred. According to petitioner, Rule 4(g) conflicts with a line of this Court's decisions, beginning with *Selling v. Radford*, 243 U.S. 46 (1917), which purportedly place an affirmative duty on the federal district courts to make an independent examination of the state disciplinary record for legal and factual errors. *See also In re Ruffalo*, 390 U.S. 544, 547, *reh'g denied*, 391 U.S. 961 (1968); *Theard v. United States*, 354 U.S. 278, 281 (1957). Apparently, in petitioner's view, the lower federal courts are required to conduct such an independent examination even as to issues not specifically called to the court's attention by the accused attorney.

It is true that *Selling* and its progeny established the independent disciplinary power of the federal judiciary and articulated the principles governing the imposition of reciprocal discipline in federal courts. But nothing in these opinions even remotely suggests that this

independent disciplinary power carries with it a duty to requisition the entire state disciplinary record and to examine it *de novo* for legal and factual errors.

To the contrary, *Selling* itself makes clear that the burden is squarely on the affected attorney to submit to the federal court those portions of the state record which he believes are in need of independent examination. *Selling v. Radford*, 243 U.S. at 51-52 (the disbarred attorney's burden is "to file the record or records of the state court within thirty days . . . by printed brief, considering the record intrinsically, to point out any ground within the limitations stated which should prevent [the federal court] from giving effect to the conclusions established by the action of the [state court]"). Indeed, this Court's own procedures of reciprocal discipline place the burden upon the accused attorney to show good cause why he should not be disbarred. *In re Isserman*, 345 U.S. 286, 288-289, 291 (1953), *set aside on other grounds*, 348 U.S. 1 (1954).

Any other rule would place an intolerable burden on the federal courts. It would put them in the business of virtually re-trying the hundreds of reciprocal discipline cases that are processed each year. It would mean, for example, that the Southern District in this case would have been required to sift through the mammoth record of petitioner's state disciplinary proceeding (some 4,000 pages of transcript, not to mention hundreds of exhibits) to satisfy itself that the discipline imposed on petitioner was warranted – even as to those matters not specifically challenged by petitioner. Nothing in the *Selling, Theard, or Ruffalo* decisions can be read to impose such a duty on the federal judiciary.

The district courts in the Second Circuit, like the district courts elsewhere, have developed a set of procedures that properly balance the twin teachings of *Selling* and *Theard* that although discipline imposed by a state "brings title deeds of high respect," it is not conclusively binding on the federal courts. Typically, upon receipt by the district court of a state judgment or order demonstrating that a federal practitioner has been disciplined by another court, the district court issues an order to show cause with a 30-day return date.

Upon expiration of the 30-day period, the court generally imposes the identical discipline unless the attorney demonstrates, or the court finds, that one of the *Selling* exceptions is present. The *Model Rules of Federal Disciplinary Enforcement*, developed and published by the American Bar Association, embrace the same concept, stating that the federal court "shall" impose the "identical discipline" unless it "clearly appears" that one of the recognized exceptions is present.

These are the very procedures followed by the district court here. Upon receipt by the court of notification of petitioner's disbarment, the Southern District issued an order to show cause directing petitioner to make a written submission within 30 days. That order provoked at least two letters from petitioner's counsel, both of which were drafted to appear to address only the issue of a stay, but which in fact covered the merits of petitioner's objections to the state disbarment order.

Having received petitioner's submissions, the Southern District became charged under *Selling* with the responsibility of considering those submissions in making an independent determination as to whether reciprocal

discipline (or discipline of a lesser degree of aggravation) was warranted. This is exactly what the Court did. Finding no merit in petitioner's constitutional and other arguments, the Southern District *independently determined* to accept the state disciplinary findings. Accordingly, on May 26, 1994, it entered an order suspending petitioner from practice in the Southern District until he had been reinstated in New York. The Second Circuit affirmed on essentially the same grounds.

Thus, contrary to petitioner's contention, both the Southern District and the Second Circuit exercised the duties assigned to them by *Selling, Theard* and *Ruffalo.* They conducted an "independent intrinsic examination" of the state disciplinary record. Although they did not *sua sponte* requisition the state disciplinary record and examine it anew for legal and factual errors, they exercised *independent judgment on those issues presented for consideration.* Nothing in this Court's opinions requires more.

B. The Alleged Conflict With Rulings Of Other Circuits

Petitioner also contends that the Second Circuit's ruling conflicts with decisions of the Tenth and Eleventh Circuits. He cites *In re Phelps*, 637 F.2d 171 (10th Cir. 1981), and *Greer's Refuse Servs., Inc. v. Browning-Ferris Industries*, 782 F.2d 918 (11th Cir. 1986), both of which stand for the settled proposition, with which we do not disagree, that the district court in a reciprocal disciplinary matter must give independent consideration to a state disbarment record. But the Southern District and the Second Circuit did give independent consideration to petitioner's state court disbarment. Indeed, the Second

Circuit expressly cited *Selling* for the proposition that the district court is required to examine the state proceeding for consistency with the requirements of due process. (Petitioner's Appendix A, p. 6a).

Although paraded as an inter-circuit conflict, the dispute here is not about principles. All of the courts of appeals, including the Second Circuit, agree that the federal district court must make an independent determination as to whether disbarment is warranted in a reciprocal discipline case. There is no "conflict" on this basic proposition. What petitioner challenges is the *application of this principle* to the facts of this case. He contends that the Southern District and Second Circuit did not exercise independent judgment, but "ministerially and mechanically imparted the disbarment order of the New York state court into the separate and independent jurisdiction of the federal district court." (Petition, p. 12). Whatever the correctness of this assertion – and we certainly believe it to be incorrect – it does not present an issue worthy of this Court's certiorari jurisdiction. At most, it shows that the district court and Second Circuit misapplied settled law, not that the Second Circuit is "out of step" with this Court or the other courts of appeals on the fundamental teachings of *Selling* and subsequent cases.

C. The Question Is Not Important

Having set up a false conflict, petitioner proceeds to argue that this Court should take this case to resolve the "conflict" among the circuits and establish a uniform rule for the federal courts. As evidence of this "conflict," petitioner includes an appendix which lists the purportedly divergent rules in the various federal district

courts on the subject of reciprocal discipline. (*See* Petitioner's Appendix K, pp. 88a-94a).

Closer examination, however, reveals that this purported "conflict" is contrived. In *Selling v. Radford*, 243 U.S. 46 (1917), this Court stated that

> we should recognize the condition created by the [disciplinary] judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a *clear conviction* on our part that we could not consistently with our duty accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with . . . principles of right and justice[.]

243 U.S. at 50-51 (emphasis added).

As can be readily seen, the "clear and convincing" language of Southern District Rule 4(g), and the similar language in dozens of other local district rules, logically derive from the "clear conviction" language of *Selling*, which has stood for over three-quarters of a century as the model to be used by the federal courts in reciprocal discipline cases. Indeed, most district court rules are

patterned after the ABA's *Model Rules of Federal Disciplinary Enforcement*, which themselves are based on the passage of this Court's *Selling* opinion quoted above.

There is, therefore, no "conflict" for this Court to resolve. The lower courts are consistent in their approach to the question of reciprocal discipline, an approach that derives directly from this Court's established precedent. From a certiorari standpoint, this case is not unusual or important in any respect. The only thing unusual about it is that a prominent New York lawyer has been disbarred through the application of settled principles to a compelling record of multiple and serious ethical violations.

II.

THE SECOND CIRCUIT'S APPROVAL OF RECIPROCAL FEDERAL DISCIPLINE BASED ON A STATE DISBARMENT PROVED BY A "PREPONDERANCE OF THE EVIDENCE" DOES NOT CONFLICT WITH OTHER CIRCUITS

As an alternative ground for certiorari, petitioner asserts that the Second Circuit's reliance on a disbarment proved in the New York state proceeding by a "preponderance of the evidence" conflicts with other circuits and should be disapproved. In response to this argument, we make the following points:

First, this Court, in denying certiorari in petitioner's state disbarment proceedings, has already declined to consider whether the "clear and convincing" standard is mandated in attorney disbarment proceedings. *In re Friedman*, 115 S.Ct. 81 (1994).

Second, the "conflict" identified by petitioner is again manufactured, not real. Virtually all of the circuit decisions cited by petitioner address the issues of the burden of proof in original disciplinary proceedings in federal court. *See, e.g., In re Medrano*, 956 F.2d 101, 102 (5th Cir. 1992) (original discipline proceeding); *NASCO, Inc. v. Calcasieu Television and Radio*, 894 F.2d 696 (5th Cir. 1990), *aff'd sub nom Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (same); *In re Thalheim*, 853 F.2d 383, 390 (5th Cir. 1988) (same). Not one even addresses, let alone rejects, the standards in reciprocal discipline cases which originate in the state courts.

Because this Court is confronted with the considerably narrower issue of the sufficiency of the standard of proof in reciprocal disciplinary proceedings, the only relevant analysis is that set forth in *Selling v. Radford*, 243 U.S. 46, 50-51 (1917). *Selling* requires rejection of state discipline only when there has been a clear and convincing failure of due process or proof – or some other conflict with "the principles of right or justice." *Id.* An application of the *Selling* factors to the present matter, however, reveals neither constitutional infirmity nor conflict with "the principles of right or justice." *Id.* Indeed, petitioner has enjoyed a plethora of process throughout all stages of the proceedings, both state and federal.

Third, petitioner is wrong to suggest that a clear and convincing standard is mandated by federal law. "The norm in federal law is the preponderance of the evidence, even when the claim is fraud and the suit may visit ruin and disgrace on the loser." *In re Palmisano*, 70 F.3d 483, 486 (7th Cir. 1995) (upholding the federal court's reciprocal discipline of an attorney who was

disbarred by the Supreme Court of Illinois); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1982) (upholding the use of the preponderance standard in SEC proceedings concerning allegations of fraud); *Steadman v. SEC*, 450 U.S. 91, 95 (1981) (upholding the use of the preponderance standard where the sanctions imposed included an order permanently barring an individual from practicing his profession).

Fourth, petitioner requests that this Court impose a heightened standard of proof upon all federal disbarment proceedings without offering a shred of empirical evidence that reliance on a preponderance of evidence standard results in wrongful disbarment of attorneys from the federal courts. Uniform imposition of a clear and convincing standard on federal disbarment proceedings would increase the amount of judicial resources required to discipline federal practitioners in reciprocal cases. Thus, in the absence of any demonstrable need for a uniform, heightened standard of proof in federal disbarment proceedings, petitioner's request for such a standard betrays an insensitivity to the reality of scarce federal judicial resources.

Even assuming that the preponderance of evidence standard results in more disbarments or sanctions against attorneys, courts are not obligated to "sacrifice the interests of litigants to reduce the risk of erroneous imposition of costs on attorneys; to the contrary, the interests of litigants deserve the greater protection." *In re Palmisano*, 70 F.3d 483, 486-87 (7th Cir. 1995). Contrary to petitioner's assertion, a high burden of proof is appropriate only when the costs of error are one-sided. *Id.* at 486; *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1982) ("[a] preponderance-of-the-evidence

standard allows both parties to 'share the risk of error in roughly equal fashion'") (citing *Addington v. Texas*, 441 U.S. 418, 423 (1979)). Although disbarment is costly for an attorney, "permitting an incompetent or otherwise inappropriate person to practice law is costly for clients and the administration of justice." *In re Palmisano*, 70 F.3d 483, 486 (1995).

Finally, inviting this Court to impose a heightened standard of proof on federal reciprocal disciplinary proceedings overlooks this Court's deference to the broad discretion accorded to district courts for purposes of regulating their membership. *Frazier v. Heebe*, 482 U.S. 641, 645 (1986) ("We begin our analysis by recognizing that a district court has discretion to adopt local rules that are necessary to carry out the conduct of its business"); *see also In re Thalheim*, 853 F.2d 383, 386 (5th Cir. 1988) ("It is well-settled that federal district courts are bound by their own disciplinary rules when proceeding against attorneys for violation of ethical standards.") (citations omitted). Moreover, Congress has also provided in 28 U.S.C. § 2071, that district courts may prescribe rules for the conduct of their business. *Id.* The authority provided in sec. 2071 includes the authority of a district court to regulate the membership of its bar. *Id.* (citing 28 U.S.C. § 1654). Neither Supreme Court precedent nor federal statutes place a premium on uniformity of attorney regulation.

III.

THE FEDERAL SUSPENSION ORDER IS WARRANTED EVEN WITHOUT CONSIDERATION OF THE *MOWEN* CHARGES

In his final attempt to persuade this Court that his case is certworthy, petitioner argues that he has been twice punished for the same conduct – in contravention of the prohibition against double jeopardy. It is true, as petitioner indicates, that the state disciplinary order rested in part on the *Mowen* charges – filing a knowingly false affidavit and giving false testimony at a hearing before a Southern District Court Judge. *In re Friedman*, 609 N.Y.S.2d 578 (1994). It is equally true, however, that the *Krieger* findings, standing alone, were sufficient to warrant disbarment. Indeed, the Appellate Division, in rendering its decision, stated: "Any one of these many serious violations would be ground for removal from the roll of attorneys." *Id.* at 586.

The New York Appellate Division in fact sustained thirteen counts of misconduct against the petitioner. Of these charges, the *Krieger* violations alone included several acts of intentional dishonesty, including the solicitation of false testimony from a fact witness; the failure to reveal materially false testimony that petitioner knew to be untrue; the failure to take appropriate remedial action with regard to unethical and illegal behavior of a private investigator; and the approval of excessive payments of money to fact witnesses. *Id.* These charges, many of which were supported by a tape-recorded conversation of petitioner asking a witness to

lie, comprise some of the most serious findings of misconduct.

Thus, even if this Court were to consider imposing a uniform standard of proof for federal attorney disciplinary proceedings, this case is inappropriate for review of that issue. Many of petitioner's ethical violations were supported by undisputed facts – indeed, with respect to the *Krieger* charges, petitioner admitted several of the essential allegations against him. A heightened standard of proof would not have been outcome determinative in this case – especially in light of the Appellate Division's finding that "there is *ample support* for the Special Referee's findings that [petitioner] is guilty of multiple serious violations of the Code of Professional Responsibility." *Id.* at 585 (emphasis added).

CONCLUSION

For the foregoing reasons, petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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